

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**In re:**

**JAMES WAYLAND MARKEL,**

**Debtor.**

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**Case No. 00-7430-6B3**

**MEMORANDUM OPINION**

At Orlando, in said District on September 5, 2001, before Arthur B. Briskman, Bankruptcy Judge.

This matter came before the Court on the Motion by James Wayland Markel ("Debtor") to enforce the automatic stay under 11 U.S.C. §362(a) or, alternatively, for injunction under 11 U.S.C. §105. Appearing before the Court were Norman L. Hull, Esq., attorney for the Debtor; and James E. Foster, Esq., attorney for the Trust and trustee. After reviewing the pleadings and evidence, and hearing live testimony and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

The Debtor filed for relief under Chapter 13 of the United States Bankruptcy Code on October 17, 2000. The Debtor's father established the Ray D. Markel Testamentary Residual Trust B ("Trust"). The Debtor is a licensed Florida attorney and previously served as co-trustee of the trust. The Debtor and co-trustee resigned as co-trustees on May 28, 1999. John H. Norris ("Successor Trustee") was then appointed as the sole trustee. The Debtor failed to

provide the Successor Trustee with information needed to prepare the opening inventory and annual accountings, prompting the Probate Court to surcharge the Debtor.

The Trust commenced litigation in Michigan Courts during the Debtor's tenure as co-trustee. The Court dismissed the suit and assessed sanctions against the Trust. The Successor Trustee has reached an agreement with the defendants in the prior litigation ("Claim"), eliminating approximately 75% of the assessed sanctions. The Debtor asserts the Probate Court held the automatic stay would not operate to prevent a settlement on July 13, 2001 and later approved the settlement proposal. The Debtor argues the Successor Trustee's attempts to settle the Claim is a violation of the automatic stay.

The Debtor's interest in the Trust is as one of three beneficiaries who are to receive equally the *res* of the Trust upon the death of their mother, Mary Markel. The Debtor does not control the Trust or have the power to direct the trustee's activities with respect to the Trust property.

### **CONCLUSIONS OF LAW**

The Court must decide whether the trust's assets are property of the Debtor's estate, and if so, whether the automatic stay prevents the trustee from settling claims which are part of the *res* of the trust. The Debtor claims the Trust property is part of his bankruptcy estate, and the automatic stay prevents the trustee from settling the Claim. The trustee asserts the assets of the trust are not property of the Debtor's estate, and only the Debtor's remainder interest in a distribution from the trust *res* is property of the Debtor's estate.

The Debtor's remainder interest in the *res* of the Trust is property of the estate. Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §362(a)(1). "By including all legal interests without

exception, Congress indicated its intention to include all legally recognizable interests although they may be contingent and not subject to possession until some future time.” *In re Knight*, 164 B.R. 372, 374 (Bankr. S.D.Fla. 1994) (*internal citations omitted*).

Trust interests are not property of a Debtor’s estate when the trust has a valid spendthrift provision. *In re Potter*, 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999). “Where there is no valid spendthrift trust provision excluding the debtor’s interest in the property held in trust pursuant to Code section 541(c)(2), every right of the debtor under the trust becomes property of the estate.” 5 *Collier on Bankruptcy* ¶ 541.11[6][a] (15th ed. Rev.2001). The Debtor’s rights in the Trust are his remainder interests. The Debtor cannot influence the trustee’s handling of the Trust. He receives no distribution from the Trust until the death of his mother, and even then he only holds a one-third interest. The estate succeeds to the Debtor’s rights under the Trust, and possesses a one-third remainder interest in the Trust *res*.

Section 362(a)(3) of the Bankruptcy Code imposes an automatic stay upon “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. §362. The Debtor and two other beneficiaries each have a one-third remainder interest in the assets of the Trust at the death of Mary Markel. The Debtor’s one-third remainder interest in the Trust *res* is property of the Debtor’s estate, and not the actual property composing the Trust, i.e., the Claim. The automatic stay applies only to property of the estate.

The Debtor’s estate will retain its remainder interest in the Trust *res*, and this remainder interest is subject to the automatic stay. No action may be taken against the remainder interest by the trustee or any creditor unless relief from stay is granted or the automatic stay period

ends. The trustee may settle the Claim because it constitutes the *res* of the Trust and not the Debtor's remainder interest in the Trust.

The Debtor's Motion for enforcement of the automatic stay under §362(a) or for injunction under 11 U.S.C. §105 is denied.

Dated this 5th day of September, 2001.

/s/ Arthur B. Briskman

ARTHUR B. BRISKMAN

United States Bankruptcy Judge